NATIONAL LABOR RELATIONS BOARD

In the Matter of: Triumph Construction Corp., Inc., Employer, and Local 1010 Highway, Road & Street Construction Laborers Union, Petitioner, and United Plant & Production Worker Local 175, IUJAT, Intervenor.	Case 29-RC-126206

PETITIONER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION

Petitioner, Highway, Road and Street Construction Laborers Local 1010, by its undersigned attorneys, hereby seeks review of the Regional Director's Decision dismissing the Petition in the above referenced matter. Petitioner sought an election among all of the Employer's paving and road building employees (save those represented by Locals 731 and 14 and 15). The undisputed record demonstrates that: a) there are some 35 employees who do most of the Employer's in house asphalt paving work as well as all other aspects of the employer's construction work and are represented by Local 1010; b) there are 4 employees who work on a crew dedicated to the Employer's Con Edison work, do only asphalt paving work, and have a Local 1010 foreman even though they are represented by Local 175; and c) there are two employees who work exclusively with the Local 1010 crews but are also represented by Local 175.

It is respectfully submitted that the Regional Director committed serious error in dismissing the petition. The Regional Director should have directed an election in the overall and presumptively appropriate unit of laborers who perform paving and road building work

regardless of material used together with a self-determination election for those four employees currently represented by Local 175 who perform only asphalt paving work on the Con Edison crew.

Preliminary Statement

With all due respect, the Regional Director's decision is based upon substantial factual errors clearly demonstrable on the record and is inconsistent with prior precedent concerning the factors that determine community of interest and prior precedent reflected in *Grace Industries LLC*, 385 NLRB No. 62 (June 18, 2012). The reader of the record has ignored the evidence of the substantial changes that have occurred at this Employer since Local 1010's certification in 2006 as the representative of employees who perform "primarily" concrete work at Triumph. The evidence demonstrates beyond peradventure that with the expansion of both the size and scope of its construction work, Triumph does different and more asphalt paving work than it ever did before the certification and that 80% of the asphalt paving work done by Triumph's own employees is done by the employees represented by Local 1010. Moreover, the evidence is clear that prior to 2011, Triumph did no asphalt paving work with Local 175-represented employees and today employees represented by Local 175 do asphalt work on only about 20% of the Employer's construction jobs . (Tr. 557 L. 23-558, L. 19).[1]

The rights of Petitioner as well as of the Employer's employees have been seriously prejudiced because the Regional Director committed clear error in: a) finding that the Employer's expansion of its operations did not affect Local 1010's bargaining unit; b) finding that there is no claim or evidence that Local 1010 represents employees who primarily perform the Employer's asphalt paving work; c) finding that there is no evidence that the description of the work in Local 1010's collective bargaining agreement at the time of the certification was no different than the work description in its current collective bargaining agreement and that the

[1] Citation is to the official transcript, page and line numbers. The text of the transcript reads "I would say 70 percent of our work is city agency related, 28 percent is Con Edison related and the other ten percent are private." It is clear from the numbers that the "28" is a transcriber's error and the number should have been 20. See also Mr. Chaikin's statement at the close of the hearing in which he noted that the Con Edison work was stated to be "20 percent of their work." (T.633, 16-20).

probative evidence does not establish that the amount of asphalt paving work performed by Local 1010 laborers has changed since the issuance of the certification; and d) ignoring Local 175's competing contract claim.

The Regional Director's ruling that no question of representation exists with regard to the existing Local 1010 unit, notwithstanding its expansion from 4 to 35 employees and the significant expansion in the employer's scope of work since the certification in 2006, is contrary to well established precedent and has denied Local 1010 the right to obtain the benefits of certification for a unit for which it now lacks certification, namely a unit made up of laborers who do paving and road building work for the Employer regardless of whether they do concrete paving or asphalt paving.

Moreover, the record in this case, in striking contrast to the record in *Grace Industries,* establishes that there is not a distinct group of "asphalt paving" employees of the Employer represented by Local 175 who have distinct skills and functions. To the contrary the undisputed evidence establishes that, at Triumph, Local 1010 represented employees perform the identical asphalt paving tasks as the Local 175 represented employees and as a group they do it faster and better than the employees represented by Local 175. (Tr. 575. L. 7 -576, L. 22).

ARGUMENT

I.

THE RECORD ESTABLISHES THAT THE REGIONAL DIRECTOR ERRED IN RULING THAT NO QUESTION OF REPRESENATION EXISTS, AS THE FACTS DEMONSTRATE THAT THE EMPLOYER'S EXPANSION IN SIZE AND SCOPE HAS AFFECTED THE WORK DONE BY THE CERTIFIED UNIT AND LOCAL 1010 IS ENTITLED TO OBTAIN THE BENEFITS OF CERTIFICATION FOR THE EXPANDED UNIT.

In 2006, Local 1010 was certified as the collective bargaining representative of a unit of laborers who do "primarily concrete paving" exclusive of employees who do "primarily asphalt paving." At the time of the election leading to that certification, Triumph employed only four

individuals eligible to vote in the election. (Exhibit A annexed).[2] At the time, Triumph's total employee complement was between 20 to 30 employees and now is over 200 employees and the four man unit has expanded to 35. (Tr. 19, L. 14-22; 230, L. 17-231, L. 5)

The Regional Director found that the evidence does not specify how the expansion in size changed the Employer's operations or affected the nature of separate units. The finding is clearly erroneous and ignores the un-contradicted testimony of Local 1010's witness Lowell Barton that both the size and scope of the work that Triumph does substantially changed since 2005. Mr. Barton testified that, prior to 2005, Triumph was "pretty much focused on small utility repairs whereas today ...(they) pick...up jobs and secure...work on larger $20 million dollar projects that include all different scopes of work besides the utility end of road building." (Tr. 20 L. 3-12). The new scope of work includes city capital projects that include roadways, sidewalks and landscaping. (Tr. 20, L. 14-19). (Tr. 20, L. 20-24). It is also undisputed that it is the Local 1010 represented employees that do asphalt paving work on those capital projects as well as larger utility projects and that the Local 175 represented employees mostly do not work on those capital projects, with the exception of two employees, Chris Rojas and Lionel Barerra, who are paid under the Local 175 collective bargaining agreement but indisputably work alongside Local 1010 laborers. (Tr. 20, L.20-24) (Tr. 558, L. 21-565, L. 20). (Tr. 488, L. 6-20; 601, L. 23-602, L. 4;. 601, L. 18- 602, L. 22).

Equally significant, Mr. Barton testified without contradiction that the expansion of Triumph's operations into capital projects for the City has meant that its asphalt paving work has significantly expanded. (Tr. 20, L.25-21, L.3). The undisputed testimony from both the Employer's witness William Licata and Local 1010's witnesses is that virtually all of the asphalt paving work that Triumph does in house is done by Local 1010 represented employees, with the sole exception of the laying of the final course of asphalt (called finish asphalt) on Con Edison

[2] At the time of the Hearing, neither Local 1010 nor the Hearing Officer had been able to locate a copy of the Excelsior List to demonstrate the size of the 2005 bargaining unit. Undersigned counsel was able to find a copy of the List faxed to her office from the Region by the time of the submission of Local 1010's post hearing brief to the Regional Director and the List was submitted as an Exhibit to the Brief and is attached hereto.

jobs that is done by four laborers represented by Local 175, whose foreman is a long time Local 1010 member.

Mr. Licata testified that the majority of Triumph's work - 70% - is now done for City agencies, 10% are private jobs and 20% is Con Edison work. (Tr. 557, L. 25- 558, L. 19). The record establishes clearly that when it comes to asphalt paving, Triumph sub-contracts out all asphalt paving work that requires a milling machine and use of a spreader but does the rest of its work in house, using primarily Local 1010 represented employees and that they do the identical work that the Local 175 represented employees do when the latter do asphalt paving work for Con Edison. (Tr. 559, L. 16-560, L. 9). There are four laborers represented by Local 175, who spend virtually all their time doing finish asphalt paving on Con Edison jobs. (Tr. 560, L. 18-562, L. 18). This Con Edison crew is supervised by a long time Local 1010 member named Ed Walsh. (Tr. 483-24, L. 484-13). He is a working foreman. The four laborers on the crew work on average 3 days a week. (Tr. 590, L. 20-25). They are not qualified to do any work other than the asphalt paving work they do. (Tr. 590, L. 13-16). When there is no work for them they are laid off. (Tr. 575, L. 4-6). The foreman is not laid off and he works 5-6 days a week. When he is not running that crew, the foreman works with the other laborer crews and is a foreman for an excavation crew on Con Edison jobs. (Tr. 575, L. 4-6). The four laborers on the paving crew are paid under the Local 175 collective bargaining agreement. The foreman is paid under the Local 1010 collective bargaining agreement.

There are also two laborers at Triumph, identified as Chris Rojas and Leo (or Lionel) Barerra, who are represented by Local 175 but who do no work with the Con Edison paving crew. Mr. Rojas does City work as part of a "Local 1010 crew." (Tr. 488, L. 6-20) (Tr. 601 L. 23, L. 602, L. 4). Mr. Barrera works along with Local 731 and Local 1010 employees in a Con Edison crew excavating and installing pipe. (Tr. 601, L. 18- 602, L. 22).

Triumph uses the Local 1010 represented employees to do asphalt paving and *all the other aspects of its expanded scope of work.* (Tr. 564, L.17-L.565, L.20). When it comes to their skills as asphalt pavers, while Mr. Licata testified that the individual members of the four

man Local 175 crew should be a little bit better than the Local 1010 represented employees because that is all they do, when it comes to the employees as a group, the crews in the Local 1010 bargaining unit are faster and better at asphalt paving than the Local 175 crew and he would pick the former over the latter any time. (Tr. 576, L. 8-22).

Thus the Regional Director committed substantial error when he found that there was no evidence that Triumph's expansion had changed the nature of its operations and the nature of the work done by the Local 1010 represented employees. The failure to recognize the change in scope of operations and especially the scope of work done by Local 1010 represented employees constituted serious and prejudicial error.

As a result of this expansion in both the size and the scope of its operations, it is undisputed that Local 1010 employees perform 80% of the asphalt paving work that Triumph does in house. Thus the Regional Director committed substantial error in his footnoted finding that there is no claim or evidence that Local 1010 represented employees primarily perform asphalt paving work. There is no dispute that Local 1010 represented employees primarily perform Triumph's in house asphalt paving work and are more skilled at it as a group than Local 175 represented employees. As noted above, asked by the Hearing Officer the following hypothetical question - if a Local 1010 represented crew and the Local 175 represented crew were both available to do a paving job would you pick one over the other? - Licata said that he would pick the guys who do the job "fastest and the best and its usually going to be the 1010 guys." (Tr. 576, L. 8-22). The fact that "finish asphalt paving" may make up only 1% of the work on a narrow scope of work called a "bump out," which the Regional Director focused on, should not be dispositive of the issues in this case, when the Employer has acknowledged that the bulk of the asphalt paving work it does in house is done by Local 1010 represented employees.

The Regional Director also erred in finding that there is no meaningful difference between Local 1010's contract in effect between 2005 and 2012 and its current contract. The current agreement specifically refers to "all types of jobs where temporary and permanent

asphalt is used," a reference not found in the preexisting agreement. (Compare Joint 2 at Article VI, Sec. 1 to Intervenor 2 at Article VI, Sec 1). He also committed substantial error in failing to acknowledge that not only do the contracts of the two unions overlap when it comes to asphalt but that Local 175's contract also covers concrete. (Tr. 356, L. 5-6). While the Regional Director emphasized the fact that Local 1010 had not filed a grievance over the Employer's use of Local 175 represented employees to do work covered by the Local 1010 contract, Local 1010's witness made it clear that the union had not wanted to file a grievance that would result in the employer paying fringe benefits to two different sets of multiemployer benefit funds, a result that might have threatened the employer's financial viability. (Tr. 221, L. 11 -223, L. 6).

The Regional Director also ignored the undisputed testimony that Local 175 represented employees were not employed by Triumph until some three years before the hearing date. Thus there is simply no longstanding history at this Employer of separate and distinct asphalt paving and concrete paving employees. (Tr. 566, L. 23- 567, L. 5). Moreover, Mr. Licata could not explain why the Con Edison asphalt paving crew (except for its foreman) are represented by Local 175. (Tr. 567, L. 13-19). Mr. Licata testified without contradiction that the sole reason for a dedicated asphalt crew has nothing to do with the so called asphalt pavers being better than the Local 1010 laborers but because he needs a crew dedicated to doing the finish paving work for Con Edison, regardless of who the members of the crew are. (Tr. 600, L. 22-601, L. 8).

II

THE REGIONAL DIRECTOR ERRED IN FAILING TO ACKNOWLEDGE THAT APPROPRIATE RESOLUTON OF THIS CASE LIES NOT IN DISMISSING THE PETITION BUT IN ORDERING A SELF DETERMINATION ELECTION AMONG THE EMPLOYEES ON THE CON EDISON CREW WHO DO ASPHALT PAVING WORK ONLY.

The Regional Director erred in finding that all of the employees of the Employer currently represented by Local 175 share a community of interest. He also committed substantial error in finding that it is undisputed that the employer applies the Local 175 contract's terms and conditions to six laborers. The stipulation entered into by Local 1010 and the other parties was that the six individuals <u>are compensated</u> by Triumph under the terms and conditions of the Local

175 contract; however four of the six work on the asphalt crew for which Local 1010 member Ed Walsh is the foreman while the two other employees have nothing to do with this so called "asphalt crew."

In determining whether a community of interest exists. the Board examines factors such as mutuality of interest in wages and hours and other working conditions, commonality of supervision, degree of skill and common functions, frequency of contact and interchange with other employees and functional integration. *Grace Industries, supra* (2012). In this case, the only factor that militates in favor of finding that the six employees constitute an appropriate bargaining unit is their mutuality of interest in their wages and fringe benefits. All other factors militate in favor of finding that two of the six employees share an overwhelming community of interest with the Local 1010 represented employees.

Thus the Regional Director committed substantial error in finding that there is a history of this Employer's laborers being represented in two separate bargaining groups, the laborers primarily performing asphalt paving and/or who are represented by Local 175 and the laborers primarily performing laying of concrete, concrete curb setting or block work and/or who are represented by Local 1010 and that the Employer's history is consistent with the "extensive history of separate asphalt and concrete units in New York City." Instead the record demonstrates and the Regional Director should have found that the Employer's history over the last eight years since Local 1010 was last certified demonstrates that the old distinctions and the earlier certification have no relevance to the way this Employer organizes its work force.

The Regional Director should have found that the Employer has a work force of Local 1010 laborers who are equally skilled at asphalt paving as they are at all other aspects of the construction work this Employer does and who perform most of the asphalt paving work that the employer does in house, while his Local 175 represented employees are a fragmented group, two of whom share a community of interest with the Local 1010 represented employees with respect to every factor except their compensation.

There is simply no principled basis upon which to find that the six employees represented by Local 175 constitute an appropriate unit for bargaining. There is no basis upon which to describe that unit, and the Regional Director did not even make that attempt. Having found that the Local 1010 employees do not primarily perform asphalt paving work he could not find that employees Rojas and Barerra, who are part of the Local 175 unit, primarily perform asphalt paving work, since their work is the same as that of the Local 1010 represented employees.

Instead the Regional Director's decision relies upon his recognition of a unit that may be described only by the extent of its organization, i.e. a unit of employees currently represented by Local 175. That is not a unit that serves any recognized principle or purpose of the Act. We note that the Regional Director found that Local 175 is not seeking a certification for its recognized unit and that is hardly surprising because there is no principled basis under the Act upon which Local 175 can seek a certification for that unit.

Instead, Local 175's attorney made it clear that if an election were held in the larger unit, the so called "dedicated asphalt crew" should have the opportunity for a self-determination election. Local 1010 agrees with that position and in its brief to the Regional Director made it clear that the only appropriate smaller unit is the dedicated asphalt paving crew, that is the four employees who do exclusively asphalt paving work. Local 1010 respectfully submits that the Regional Director should have ordered an election in the presumptively appropriate overall unit of employees who perform paving and road work for the employer regardless of material used and a self-determination election in the small unit of four employees on the Con Edison crew who perform exclusively asphalt paving work and have heretofore been represented by Local 175.

That is a resolution that serves the interests of all concerned parties as well as the purposes of the Act.

CONCLUSION

The Regional Director erred in not directing an election in the overall unit of paving and road building employees regardless of material used, exclusive of employees represented by Locals 731, 14 and 15, together with a self-determination election among the employees on the Con Edison crew who perform exclusively asphalt paving work. The Board should remand to the Regional Director to order both elections.

Dated: New York, NY
June 18, 2014

Respectfully submitted

/s/
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NATIONAL LABOR RELATIONS BOARD
REGION 29

In the Matter of: Triumph Construction Corp., Inc., Employer, and Local 1010 Highway, Road & Street Construction Laborers Union, Petitioner, and United Plant & Production Worker Local 175, IUJAT, Intervenor.	Case 29-RC-126206 AFFIRMATION

AFFIRMATION

I hereby affirm under penalties of perjury that on June 18, 2014, I served a true and accurate copy of the Petitioner's Request for Review of Regional Director's Decision upon the following parties at the below mentioned addresses by email:

Intervenor Local 175 at
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Triumph Construction at
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